

1 IN THE UNITED STATES DISTRICT COURT
2 MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION
3 -----
4 UNITED STATES OF AMERICA,)
5 Plaintiff,)
6)
7 v.) CASE NO. 3:10-00009
8)
9 JEREMY SETH TUMMINS,)
10 Defendant.)

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W I T N E S S E S :

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SCOTT LEVASSEUR (Continued from 2/24/15)

3

Direct Examination by Ms. Daughtrey Page 5

4

Cross Examination by Ms. Thompson Page 34

5

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(Voir Dire)

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SCOTT LEVASSEUR

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Examination by Ms. Thompson Page 56

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P R O C E E D I N G S:

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THE COURT: Before we get started, I was informed by my law clerk that there was a request related to some exhibits. As reflected in my orders setting trials and other matters, I would request that counsel raise these matters in open court and not send the request through my staff.

7

MS. DAUGTREY: I apologize for that, Your Honor.

8

THE COURT: Any preliminary matters before we get started?

10

MS. DAUGTREY: Your Honor, I did discover this morning that there was an error in Exhibit 24. It's not with regard to the images that are there, but where the images were located. I have conferred with Ms. Thompson. I have corrected that. It's Exhibit 24 that has not been entered into evidence, so the jurors have not seen that yet. And I would ask permission from Your Honor to replace those exhibits in the jury books. I think it will take less than five minutes. We have a number of people here to help do that.

19

THE COURT: Do you expect to get to Exhibit 24 during the first session?

21

MS. DAUGTREY: Yes, I do. Before the first break.

22

THE COURT: I'm going to ask the Marshal to go into the jury room, collect the exhibit books and bring them to the courtroom, and allow you all to make the substitution.

25

MS. DAUGTREY: Thank you, Your Honor.

1 THE COURT: We'll be in recess.

2 (Recess.)

3 THE COURT: You may be seated. All right. Are you
4 ready?

5 Bring the jury in, Mr. Marshal.

6 (Jury in.)

7 THE COURT: You may be seated. Good morning, ladies
8 and gentlemen of the jury. We will continue now with the
9 examination of this witness.

10 Counsel?

11 CONTINUED DIRECT EXAMINATION

12 BY MS. DAUGTREY:

13 Q. Good morning, Detective Levasseur.

14 A. Good morning.

15 Q. Yesterday there was a mention of whether
16 Limewire still exists. Can you tell us what you know about
17 that?

18 A. Limewire company was shut down by the United
19 States government a few years back. You can still get versions
20 of Limewire from the Internet that were already in production,
21 but Limewire itself has been shut down.

22 Q. Okay. Is that also true of Morpheus?

23 A. I don't know, ma'am. I haven't heard anything
24 about that.

25 Q. Okay. I have put a couple of exhibits from

1 yesterday in front of you. Turning to Exhibit 18, can you tell
2 us whether any of any of those file names include references to
3 minors?

4 A. They do, ma'am, yes.

5 Q. Okay. And did you view those files to see if
6 they might actually contain minors?

7 A. Yes, ma'am.

8 Q. What did you find?

9 MS. THOMPSON: Your Honor, I object at this point.

10 THE COURT: Ladies and gentlemen of the jury, I'm going
11 to have to excuse you for a few minutes. I'm sorry, this is one
12 of those pogo stick moments. Please don't discuss the case
13 amongst yourselves until you receive all of the evidence, the
14 argument of counsel, and the charge of the Court. It should be
15 a brief recess.

16 (Jury out.)

17 MS. THOMPSON: Your Honor, whether or not these people
18 are minors is a question for the jury to decide. And so I
19 object to Mr. Levasseur telling the jury whether or not these
20 people are minors.

21 MS. DAUGHTREY: Your Honor, if I may, I believe his
22 answer is going to be that they are adults or that they are
23 difficult to tell. I don't know if Ms. Thompson will still
24 object to that or not.

25 THE COURT: I don't know the basis for this statement.

1 I don't know, did he -- is it based their appearance? Is it
2 based upon prior information that this person on the screen is a
3 minor? I mean, how does he know it?

4 MS. DAUGHTREY: Right. And he won't be testifying that
5 any of them are minors. He will be testifying that they appear
6 to be adults. Or difficult to tell.

7 THE COURT: Whether they are a minor -- it seems to me
8 that it's more helpful if we provide a more specific or
9 quantitative basis upon which he makes the conclusion that they
10 are minors. And I think that's more helpful and more probative
11 to the jury than to just him say, I looked at this and they are
12 minors. We have -- how does he make that determination?

13 MS. DAUGHTREY: Would it be objectionable to the
14 defense if I asked if any of these files contained adults?

15 MS. THOMPSON: No, I don't -- I don't object to -- they
16 are clearly adults.

17 THE COURT: Well, that --

18 Sir, when you looked at these images, how did you come
19 to any conclusion about the age of the persons on the images
20 that you saw? How did you come to any conclusion about that?

21 THE WITNESS: Just from my personal experience and
22 knowledge with viewing these files all the time and --

23 THE COURT: I mean, did you make a determination based
24 upon their bodily appearance or what?

25 THE WITNESS: Based on their -- what they appear to be.

1 Some of the files she is asking about in Exhibit 18 -- they are
2 obviously grown adults. Some of the files are what we call age
3 difficult. They could be 18 year olds or they could be 16 year
4 olds. That's what we call difficult, and we don't include that
5 as child pornography.

6 THE COURT: Well, why is this document in evidence?

7 MS. DAUGHTREY: Your Honor, the document is in evidence
8 because these are file names that --

9 THE COURT: Why is it relevant?

10 MS. DAUGHTREY: It's relevant because the file names
11 have information about child pornography in them. The file
12 names look like that. What he's going to testify to is that he
13 often -- that people do download files, thinking they are child
14 pornography, and that they end up being adult pornography.

15 MS. THOMPSON: Your Honor, I take back what I said a
16 minute ago about it's fine if he testifies some were adults. I
17 feel uncomfortable him testifying as to any age, because that
18 might leave the jury with the impression that he knows for sure
19 who is an adult, and then the other ones he has expertly looked
20 at and they were children. And I object to that.

21 MS. DAUGHTREY: Okay. I will withdraw the question.

22 THE COURT: You can bring the jury back in.

23 (Jury in.)

24 THE COURT: Once again, ladies and gentlemen of the
25 jury, please -- I apologize. Please take any frustrations out

1 on me.

2 Counsel?

3 MS. DAUGHTREY: Thank you.

4 BY MS. DAUGHTREY:

5 Q. Detective Levasseur, yesterday you mentioned
6 that there was a user profile, an old user profile, on the prior
7 installation of Windows on that laptop computer.

8 A. Yes, ma'am.

9 Q. Can you explain what that means?

10 A. Well, the last time before the new installation
11 of Windows occurred, the computer was in use, and it had folders
12 and files and had profiles. And the profile name that I was
13 able to recover from unallocated space showed that the user
14 profile name was Seth. In the new installation of Windows, it's
15 the default name that Windows gives if you don't actually type
16 in a user profile. It just defaults to owner.

17 Q. Did you find any files that were associated with
18 that profile of Seth that had been on the computer?

19 A. I did.

20 Q. Okay. Your Honor, if I may approach the witness
21 and hand him Exhibit 21.

22 Do you recognize this?

23 A. I do.

24 Q. What it is?

25 A. It's list of file fragment names, names of files

1 that I found on the laptop computer from a different
2 installation of windows. One where the user profile name was
3 Seth. And I was able to recover a file path and a file name
4 which was -- the file path was Documents and Settings, Seth,
5 Desktop, New Folder. So that means that there was a folder
6 called New Folder on the desktop.
7 And within that folder there was a file named
8 Girl_12_Year_Old_Fuck_with_Boy_13_Year_Old_In_Birthday_Party.avi
9 which would indicate it's a movie file.

10 The next file that I was able to recover from that
11 folder -- the file name I was able to recover from that folder
12 was Teacher_Seducing_Student.divx, which is another multi-media
13 file, a video file. And then the third one was
14 Russian_Preteens.avi, which is a movie file.

15 MS. DAUGHTREY: Your Honor, at this time I would ask
16 that Exhibit 21 be entered into evidence.

17 THE COURT: It will be admitted.

18 BY MS. DAUGHTREY:

19 Q. Were these pieces or file names -- were they
20 found all in the same place on the laptop computer? Or did they
21 come from different places?

22 A. They came from unallocated space. And as far as
23 the physical location, I don't remember documenting that.

24 Q. Okay. Was this laptop computer used for things
25 other than pornography?

1 A. Yes, ma'am.

2 Q. And did you find any files related to any other
3 person other than Mr. Tummins on this computer?

4 A. Yes, ma'am.

5 Q. Can you tell us about that?

6 A. Yesterday I said that after Windows was
7 installed that a whole mass of files were copied back over onto
8 the computer. In the mass copying of all those files back onto
9 the computer, there -- there was a folder called -- the folder
10 was called Bryson. And within that folder were a couple -- more
11 than 2,000 files and folders that appeared to belong to a man
12 called Bryson. And from the documents it was all school-related
13 documents to do with -- a lot of school-related documents to do
14 with middle school. It appears as though he was a teacher.

15 And copied in that folder was also a -- was also a
16 database file for email that would have come from a computer,
17 but I'm not sure which computer, because it was copied over to
18 this computer. And it had emails from this Bryson man, dating
19 -- the last email in that email database file was in 2005. So
20 that -- a lot of those files and stuff in that folder date back
21 to 2005.

22 Q. And that's approximately how many years before
23 you seized the computer?

24 A. I seized the computer in 2009. So about four
25 years.

1 Q. And were you able to tell whether or not there
2 was an individual named Bryson who used that computer?

3 A. I searched for anything I could to try to find,
4 you know, any other documents on the computer as showing this
5 Mr. Bryson as using this computer, and I found none.

6 Q. Did Mr. Tummins ever tell you that somebody else
7 had used that computer?

8 A. No, ma'am.

9 Q. Okay. Did you find other documents that were
10 related to the defendant on that computer?

11 A. I did.

12 Q. If I may hand you Exhibits 22 and 23. Do you
13 recognize those documents?

14 A. I do.

15 Q. And can you tell us what Exhibit 22 consists of?

16 A. Exhibit 22 is a document that I found on the
17 computer, and it has to do with students' grades. And it's
18 digitally signed J. S. Tummins. And he's informing parents of
19 students' grades.

20 Q. Okay. And are the other documents similar
21 documents to that?

22 A. The second document is -- has -- it's titled at
23 the beginning as Seth Tummins Education 5360 Final Exam, Dr.
24 McCanahan. And then there is writing about the teaching. And
25 the next image is -- it's titled Eight Images. And it's

1 digitally signed on the bottom J. S. Tummins. And it talks
2 about:

3 The premise of my work is to serve as an introduction
4 to one another, to our lands. It appears to be some kind of
5 school, college document.

6 Q. And were these -- is this information that you
7 found on the laptop computer?

8 A. Correct.

9 Q. Okay. And Exhibit 23 -- just generally, what is
10 in that exhibit? Do you recognize it? And what is in it?

11 A. Those are fragments of Hotmail being accessed
12 with the user name of Seth. And another fragment of email with
13 SethTummins@Hotmail.com showing as email on the bottom.

14 MS. DAUGHTREY: Your Honor, at this time I would like
15 to ask to enter Exhibits 22 and 23 into evidence and allow the
16 jurors turn to those tabs.

17 BY MS. DAUGHTREY:

18 Q. Going back to Exhibit 23 -- I mean 22, I'm sorry
19 -- do you recall where you found those --

20 THE COURT: Excuse me for a moment. First of all,
21 Exhibits 22 and 23 are admitted. I think it would be more
22 appropriate to have them admitted before you get into the
23 substance.

24 MS. DAUGHTREY: I apologize to Your Honor.

25 BY MS. DAUGHTREY:

1 Q. Detective Levasseur, can you tell us where those
2 documents were found on the computer, those three pieces out of
3 Exhibit 22?

4 A. Exhibit 22, they were in the Owner Profile
5 folder. And I believe in the My Documents folder. I'm not a
6 hundred percent sure, but I believe in the My Documents folder.

7 Q. Okay. And Exhibit 23 -- where on the computer,
8 on the laptop, did you find these?

9 A. I pulled these out of either unallocated space
10 or page file.sys.

11 Q. Okay.

12 A. Well, it's going to be unallocated space,
13 because the page file would not have existed for this user
14 profile on the current computer. So it would be unallocated
15 space.

16 Q. The bottom of Exhibit 23, the third item there
17 -- what is the nature of that?

18 A. It appears to be a communication. It starts
19 out: Laura McMullin and Andrea Tummins. This inside panel is a
20 good place to provide additional information. If it's a musical
21 CD, you may want to list credits or give special thanks. You
22 may also want to provide the date and location of the recording
23 or copyright information. If your CD contains software, you may
24 want to provide installation instructions, system requirements,
25 or product information. Produced in late December 2007 for

1 friends and family, Greetings from Tennessee, phone number --
2 and the phone number is listed -- and then email
3 SethTummins@Hotmail.com.

4 Q. Do you know who Laura McMullin is?

5 A. Do I know what, ma'am?

6 Q. Do you know who Laura McMullin is?

7 A. I believe that that's his wife's maiden name.

8 Q. Did you find any other items or any evidence of
9 Laura McMullin Tummins on this laptop computer?

10 A. I don't recall so, ma'am.

11 Q. Did you find any evidence that she had used the
12 computer?

13 A. I did not, ma'am.

14 Q. You mentioned yesterday that you thought that
15 the reinstallation may have happened because why?

16 A. The computer got a virus and it stopped working
17 or partially working.

18 Q. Okay. And is it possible that that virus could
19 be responsible for the files on the computer?

20 A. I didn't find any evidence of that, ma'am.

21 Q. Okay. In your experience investigating child
22 exploitation cases and doing computer forensic exams, have you
23 ever run across a virus that can download child pornography to a
24 computer?

25 A. No, ma'am.

1 Q. We've talked a lot about the file names and
2 other information that was found on each of these computers.
3 And I would like to turn your attention now to the content of
4 some of those files. In examining these computers, were you
5 able to recover any files that involved sexual activity that
6 might include children under the age of 18?

7 A. I was.

8 Q. Okay. Were you able to recover any video files?

9 A. I was.

10 Q. And where were those video files located?

11 A. In the recycle bin.

12 Q. On which computer?

13 A. In the tower, the Gateway tower.

14 Q. Okay. And did you find any other images on the
15 computer?

16 A. On the Gateway computer?

17 Q. On either computer.

18 A. I found a lot of images and videos on the
19 computers, yes.

20 Q. Okay. If I may approach and hand you what has
21 been previously marked as Exhibit 24. Without going into any
22 detail about this exhibit, could you just look at it and see if
23 you recognize the exhibit.

24 MS. THOMPSON: Your Honor, may I approach?

25 THE COURT: Yes.

(whereupon, a bench conference was held, out of the hearing of the jury, to wit:)

3 MS. THOMPSON: Several of the jurors have already
4 turned the page and are already looking at these exhibits before
5 they have been introduced. And I would also, while we're up
6 here, like to renew my objection to still photographs of videos
7 being introduced instead of the video.

8 THE COURT: For the reasons stated earlier, the
9 objections are overruled. The jurors having notebooks with all
10 of the exhibits is something that was agreed to earlier. They
11 asked if they could do that ahead of the schedule and look at
12 exhibits before they were entered into evidence. That was
13 agreed to earlier.

14 | (Conclusion of bench conference.)

15 BY MS. DAUGHTREY:

16 Q. Sorry if I have already asked this question. Do
17 you recognize -- ?

18 A T do

19 Q. And where did those -- what does that exhibit
20 contain?

21 A. It contains -- the first two pages contain
22 images that were thumbnails that I recovered off of the laptop.
23 And the other pages are screen captures that I created of the
24 video files that I recovered off of the desktop.

25 0. okay.

1 MS. DAUGHTREY: Your Honor, at this time I would ask
2 that Exhibit 24 be entered into evidence and that the jurors be
3 allowed to turn to that tab.

4 THE COURT: It will be admitted. And ladies and
5 gentlemen of the jury, I'm going to ask you, please avoid, if
6 you can, getting ahead in the exhibit book. Let's just wait
7 until it's actually admitted. I know there is a temptation to
8 just get ahead of schedule and see what's coming up, but if you
9 could, try and avoid that.

10 BY MS. DAUGHTREY:

11 Q. Looking on the first page, at the very top there
12 is a file name. Can you tell us what that file name is?

13 A. It's a file name. It's preceded by thumbs DB,
14 which is what the system -- that thumbs brackets 146215.db is
15 issued by Windows software. But the actual file name of the
16 image was with -- well, the image was a video file. It was
17 My_Nine_Year_Old_Cousin_Sucking_My_Cock.mpeg. And then you have
18 brackets with numbers.jpeg. That's a Windows function. Windows
19 is making a jpeg, an image, of the video file frame. So it's
20 got two extensions.

21 Q. Okay. So the original file name that was
22 originally on the computer before Windows and Thumbs.db added on
23 things to it -- what was that the original file name? What did
24 it begin with?

25 A. My.

1 Q. And what did it end with?

2 A. Mpg.

3 Q. Okay. So it's that portion in the middle?

4 A. Correct.

5 Q. Okay. And you testified earlier that you found
6 this on the Compaq laptop computer?

7 A. Correct.

8 Q. Where was it on that computer?

9 A. It was in the thumbs database file that was
10 within the Limewire Save folder.

11 Q. And did you find -- you indicated before that it
12 was --

13 A. Let me correct that. I'm thinking of another
14 image in that location that I gave. Give me just a second. I'm
15 going to have to say that I don't recall which folder I got that
16 out of.

17 Q. Okay. Did you -- in the course of your
18 examination, did you prepare a report in this case?

19 A. I did.

20 Q. All right. And do you have that report with
21 you?

22 A. Let me check my report, ma'am. That thumbnail
23 would have come from Documents and Settings/Owner/My
24 Documents/Morpheus Shared/Downloads. So it would have been in
25 the downloads folder that was inside of the Morpheus shared

1 folder, which was in the My Documents folder.

2 Q. okay. How would this thumbnail have gotten to
3 that folder?

4 A. Morpheus downloads the files to the file that
5 it's directed to. And apparently this one was the Morpheus
6 Shared/Downloads folder. And once the video file is downloaded
7 to that folder and then viewed, a thumbnail is created by
8 Windows to show the representation of the file to the user. So
9 Windows makes the thumbnail file from the video file. And it
10 resides there. And it's like I described yesterday. It's in
11 the database file. And even though the file is deleted, that
12 image of the video still stays there.

13 Q. Do you recognize this image?

14 A. I do.

15 Q. And does it belong to a specific series that you
16 know of through your investigation and work?

17 A. It does.

18 Q. what is the name of that series?

19 A. The vicky series.

20 Q. Turning to Page 2.

21 THE COURT: of what exhibit, please?

22 MS. DAUGTREY: of Exhibit 24.

23 BY MS. DAUGTREY:

24 Q. Can you tell us what the file name is in this
25 case?

1 A. It's a -- the original file name I do not have.
2 I just -- you just have Thumb Cache-961416.db. And that's going
3 to be -- the location of that file is going to be a mistake on
4 my part. The file name I told you that it was located on the
5 laptop. That file name is indicative of windows vista because
6 of the underscore 96 in the file name that I didn't look at
7 earlier. And that file name is going to be indicative of vista.
8 So I was incorrect when I said that file was located on the
9 laptop. And I told that you earlier wrongly.

10 Q. Okay. Do you have a pen with you?

11 A. No, ma'am.

12 Q. If I may approach. Could you cross out the
13 location on that and put your initials by it.

14 THE COURT: If would you date it. Date the change.

15 (Witness complies.)

16 THE WITNESS: I'm vapor locked. What's the date?

17 BY MS. DAUGTREY:

18 Q. I believe it's February the 25th. Can you tell
19 us why it is that this file name does not have the original file
20 name in it?

21 A. Windows XP and windows Vista and windows 7 --
22 they act differently, and they handle these files differently.
23 In windows XP, the thumbnail database file resides in the folder
24 where the files were. So it's very easy to correlate as to
25 where those files actually were, even though they were deleted.

1 In Windows Vista and Windows 7, the thumbnails database file is
2 in a Windows folder and not in the folder of where the file was.
3 And it stopped giving us location of the actual file name and
4 just gave us what you are looking at on the paper, more or less.

5 Q. Turn to Page 3 of Exhibit 24. Can you explain
6 what this series of images is?

7 A. These are screen captures that I took from a
8 video file that was in the recycle bin. When I recovered it,
9 the original file name to that file was
10 Family_Sex-13YO_Brother_Fucks_11YO_Sister_and_Sperm_Inside.mpeg.

11 Q. So were you able to recover the whole video?

12 A. I was.

13 Q. And how long was that video?

14 A. Ma'am, this exhibit that I have is incorrect.
15 The location on my exhibit is saying that it came from the
16 laptop. And I know that we -- it was on a desktop. I don't
17 know if all of the exhibits are like that.

18 Q. Okay. If you could again take your pen and
19 cross out the incorrect portion and initial and date it.

20 A. (Witness complies.)

21 Q. All right. So which computer was this?

22 A. This came off of the tower. This is the same
23 video file that I downloaded on my undercover operation.

24 Q. Okay. And is this one of the ones that you
25 downloaded -- on what date?

1 A. The 21st of April, I believe it was.

2 Q. okay. And how long is this video?

3 A. This video is approximately five minutes and 55
4 seconds long.

5 Q. And where -- what is this initial frame? what
6 does that mean?

7 A. The initial frame, the screen capture -- well,
8 that would be the thumbnail of the video file. It's the initial
9 frame of the video. And it's depicting somebody appears to be
10 laying down in panties.

11 Q. Where did the other additional frames come from?

12 A. I -- I played the video, and paused it and took
13 screen captures of the screen to make these exhibits.

14 Q. And these exhibits -- are they all in the first
15 few frames of the file, over the whole file? Or what parts of
16 the file or the video file did they come out of?

17 A. On the first few frames you see, of course, I
18 started with the first frame. And then they were the beginning
19 of the video file, the next couple. And it's a progression
20 through the movie file. The next two. And then the final two
21 are the ending of the video file.

22 Q. Okay. And the final two -- what page are those
23 on in this exhibit?

24 A. Page 4.

25 Q. Okay. And can you explain what that last screen

1 shot is from the video?

2 A. It appears to be a --

3 MS. THOMPSON: Your Honor, I object to him describing
4 the picture. The picture --

5 THE COURT: would counsel approach the bench?

6 (Whereupon, a bench conference was held, out of the
7 hearing of the jury, to wit:)

8 THE COURT: Yes, ma'am.

9 MS. THOMPSON: I object to him describing the picture
10 and what it appears to be. The picture is in front of the jury.
11 They can make their own decision regarding the content.

12 THE COURT: What is this testimony going to be?

13 MS. DAUGHTREY: That it's a picture of a girl on a bed.

14 MS. THOMPSON: Well, even just saying the word, girl.
15 It could be a woman on a bed. I object to him describing the
16 picture.

17 THE COURT: Is he going to provide any basis for which
18 he says it's a girl as opposed to a woman?

19 MS. DAUGHTREY: Your Honor, I will withdraw the
20 question.

21 (Conclusion of bench conference.)

22 BY MS. DAUGHTREY:

23 Q. Turning to Pages 4 and 5 of Exhibit 24, on what
24 computer did you find this?

25 A. I found them on the tower, the Gateway tower.

1 Do you want me to make the correction?

2 Q. Yes, if you could, please. And initial and date
3 it.

4 A. (Witness complies.)

5 Q. And where on the Gateway computer did you find
6 the file?

7 A. The recycle bin.

8 Q. And this file end that's at the very top -- what
9 is that?

10 A. The file end at the very top is a file name
11 given by windows Operating System to the file when it's
12 introduced into the recycle bin.

13 Q. Okay. And the original file name -- where does
14 that come from?

15 A. The original file name comes from the data
16 within the recycle bin.

17 Q. And how long is this particular video?

18 A. This video is approximately 32 minutes and 16
19 seconds.

20 Q. Okay. And is this -- how did you go about
21 creating these images?

22 A. I played the -- again, the initial frame of the
23 movie file, which would also be the thumbnail, is the first one.
24 And then I played the video in a Media Player, paused it, took a
25 screen capture, and moved it off to Word Document. off -- yeah,

1 off the Word Document.

2 Q. So all of these images that are on these two
3 pages come from that video?

4 A. Correct.

5 Q. And is that true of the previous set as well?

6 A. Correct.

7 Q. Is this one of the ones that you downloaded?

8 A. This is.

9 Q. And turning to the final two pages. And tell us
10 what computer you found this on.

11 A. This was also located on the Gateway tower. Do
12 you want me to make the change?

13 Q. Yes, please. And how long is this video?

14 A. This video is approximately 16 minutes and four
15 seconds long.

16 Q. And I'm sorry if I already asked you. Where on
17 the Gateway computer was this found?

18 A. In the recycle bin.

19 Q. Did you create these images in the same way you
20 did on the previous four pages?

21 A. I did.

22 Q. Okay. If I may approach and hand you
23 Government's Exhibit 25. Do you recognize that CD?

24 A. Yes, ma'am.

25 Q. Have you viewed the content of that CD?

1 A. Yes, ma'am.

2 Q. How do you know?

3 A. I did it this morning, and I initialed the disk.

4 Q. And what is on that disk?

5 A. It contains video files that are in the -- from

6 what I took screen captures from.

7 Q. So this Exhibit 24 -- the video files are on

8 that disk?

9 A. Correct.

10 MS. DAUGHTREY: Your Honor, at this time I would ask

11 that that be entered into evidence.

12 THE COURT: Exhibit 25 will be admitted.

13 BY MS. DAUGHTREY:

14 Q. Is it possible that these files were

15 accidentally downloaded to this computer? Or these computers?

16 A. No, ma'am.

17 Q. Based on what you found on these computers, do

18 you have an opinion on whether or not a user of the computer was

19 trying to view child pornography?

20 A. Yes, ma'am.

21 Q. What is your opinion about that?

22 A. It's my opinion --

23 MS. THOMPSON: Your Honor, I object.

24 THE COURT: Ladies and gentlemen of the jury, we are

25 going to have to excuse you for a few minutes. Please don't

1 discuss the evidence until you receive all of the evidence, the
2 argument of counsel, and the charge of the court.

3 (Jury out.)

4 THE COURT: You may be seated.

5 MS. THOMPSON: Yes, Your Honor. I object. She is
6 asking him in his opinion does he believe -- she is asking him
7 to go to the intent of Mr. Tummins when he downloaded this
8 pornography, if he did. And Your Honor, I would state that the
9 ultimate question of intent is specifically listed in the
10 evidence rules. She may not ask him to comment on Mr. Tummins'
11 intent. Just because she substitutes the name of the user
12 instead of Mr. Tummins, she is asking him to comment on the
13 specific intent of downloading these files. That's an ultimate
14 question for the jury to decide. I object to him answering this
15 question.

16 MS. DAUGTREY: Your Honor, the question was whether or
17 not the user of the computer, not Mr. Tummins.

18 THE COURT: Yeah, but all of your other questions --
19 all of the other evidence you have elicited from this witness is
20 that it had to be Mr. Tummins. And that Tummins was the only
21 one using these computers. That's all of the evidence you have
22 been eliciting. You have been excluding everybody else. If
23 anybody else's name shows up, you say, any evidence that they
24 used this computer? So I don't think that is a legitimate
25 distinction.

1 MS. DAUGHTREY: Okay.

2 THE COURT: Anything else?

3 MS. DAUGHTREY: No.

4 THE COURT: Further response to the objection?

5 MS. DAUGHTREY: No, Your Honor.

6 THE COURT: No, her response to your objection.

7 MS. DAUGHTREY: I'm sorry. I withdraw the question.

8 I'm sorry.

9 THE COURT: okay. The question is withdrawn.

10 MS. THOMPSON: Your Honor, since the question has
11 already been asked, could the Court please instruct the jury to
12 disregard the question?

13 THE COURT: I will instruct them that the question has
14 been withdrawn.

15 (Jury in.)

16 THE COURT: Once again, I apologize, ladies and
17 gentlemen of the jury. The question asked of the witness was
18 withdrawn.

19 You may ask your next question.

20 BY MS. DAUGHTREY:

21 Q. Detective Levasseur, I asked you questions
22 yesterday about talking with the defendant on May 18 of 2009.
23 who is it that you interviewed?

24 A. I interviewed Mr. Jeremy Seth Tummins, sitting
25 over there.

1 Q. And what is he wearing in the courtroom today?

2 A. He is wearing a blue shirt and a gray jacket.

3 MS. DAUGTREY: Your Honor, may the record reflect that
4 he has identified the defendant.

5 THE COURT: The record will so reflect.

6 BY MS. DAUGTREY:

7 Q. And where is it that this interview took place?

8 A. At Mr. Tummins' residence.

9 Q. Is that located in the Middle District of
10 Tennessee?

11 A. It is.

12 Q. Did you record that interview?

13 A. I did.

14 Q. Why?

15 A. I record all my contacts with suspects and when
16 I do search warrants. That's just what I do.

17 Q. Is that something that other law enforcement
18 officers in your agency typically do?

19 A. Yes, ma'am.

20 Q. Okay. Did you tell him you were recording the
21 interview?

22 A. No, ma'am.

23 Q. Why not?

24 A. I didn't have any reason to.

25 Q. Is that something that other law enforcement

1 officers in your agency do?

2 A. Yes, ma'am.

3 Q. How long is that recording?

4 A. I think it's over two hours.

5 Q. Okay. Did you listen to that interview in
6 preparation for this trial?

7 A. I did.

8 Q. When did you listen to it?

9 A. On Monday.

10 Q. Okay. Were you tough on Mr. Tummins when you
11 were interviewing him?

12 A. I was.

13 Q. Why?

14 A. I felt he wasn't being honest to me. He wasn't
15 -- after he initially confessed that he was the one that
16 downloaded the child pornography, my questions --

17 MS. THOMPSON: Your Honor, I have an objection.

18 THE COURT: Would counsel approach the bench.

19 (Whereupon, a bench conference was held, out of the
20 hearing of the jury, to wit:)

21 MS. THOMPSON: I object to whether -- he's giving an
22 opinion as to whether or not my client was honest in what he
23 stated. The jury can listen to interview, and the government
24 can put the interview on. But I object to him giving an opinion
25 about whether or not my client was honest. And I object to him

1 calling it a confession at this point. A confession has certain
2 specific legal requirements and he has not been set up to
3 testify to that. So I object to that.

4 MS. DAUGHTREY: Your Honor, he is just testifying to
5 what he believed and why he was being hard on him. Certainly
6 the other things are subject to cross examination if the defense
7 wants to do that. I don't feel it's necessary to play a two
8 hour tape for the jury. I think his answering questions about
9 that -- if Ms. Thompson wants to back and play that tape, that's
10 fine. But I'm not going to ask the jury to sit through two
11 hours of it. I think a summary of it is fine.

12 THE COURT: The question wasn't designed to elicit a
13 summary. It was designed to give an opinion on something that I
14 don't know that there is a predicate for. I mean, he is
15 characterizing something nobody has heard.

16 (Conclusion of bench conference.)

17 THE COURT: Ladies and gentlemen of the jury, we're
18 going to take our morning recess. Please don't discuss the case
19 amongst yourselves until you receive all of the evidence, the
20 argument of counsel, and the charge of the Court. It will be
21 about a 15 minute recess.

22 (Jury out.)

23 THE COURT: We'll be in recess.

24 (Recess.)

25 THE COURT: You be may be seated. The objection to the

1 testimony eliciting the opinion of the officer on whether the
2 defendant was truthful in the interview, the Court notes a
3 series of cases citing United States v. Wright, 464 Fed. App.
4 475, beginning at Pages 479 and continuing over to 480. Of
5 particular note, the Sixth Circuit cited one of its earlier
6 opinions in United States v. Warshak, 631 F.3d 266, that
7 testimony that the defendants took actions with certain intent
8 violated Rule 704(b) but noted in that case the error was
9 harmless.

10 And then in United States v. Garcia, -- I'm sorry,
11 United States v. Grenard, which is another case cited
12 approvingly, an agent's interpretation of phone calls, including
13 some the jury had not heard, usurped the jury's function.
14 They noted also that the general rule was that determining the
15 weight to be given evidence is ordinarily a question before the
16 jury. So I'm going to sustain the objection to the question.

17 Bring the jury back in.

18 (Jury in.)

19 THE COURT: All right, ladies and gentlemen. The Court
20 is going to instruct you that the objection to the last question
21 was sustained, and you are to ignore the question.

22 BY MS. DAUGTREY:

23 Q. Detective Levasseur, you indicated in earlier
24 testimony that you listened to the recording in preparation for
25 testimony; is that correct?

1 A. I did.

2 Q. And is your testimony today and yesterday
3 consistent with that recording to the best of your recollection?

4 A. It is.

5 MS. DAUGTREY: That's all the questions I have. Thank
6 you.

7 THE COURT: You may cross examine.

8 Ladies and gentlemen, the Court is going to instruct
9 you to disregard the last question and the last answer. You may
10 cross examine.

11 CROSS EXAMINATION

12 BY MS. THOMPSON:

13 Q. Good morning, Detective Levasseur.

14 A. I can't hear you, ma'am.

15 Q. Okay. Good morning, Detective Levasseur. How
16 are you?

17 A. Good. Good morning.

18 Q. I want to start off with asking you some
19 questions about the restrictions on child pornography. Under
20 the law, --

21 MS. DAUGTREY: Your Honor, --

22 THE COURT: Sustained.

23 BY MS. THOMPSON:

24 Q. Under the law, I am not --

25 THE COURT: This man is not qualified as a lawyer. if

1 you want to ask him questions about his experience, you may do
2 so.

3 MS. THOMPSON: Okay.

4 BY MS. THOMPSON:

5 Q. In your experience, is a defense attorney
6 allowed to have a copy of these images in question that might be
7 child pornography?

8 MS. DAUGHTREY: Objection, Your Honor.

9 THE COURT: Sustained.

10 Ladies and gentlemen of the jury, I'm going to have to
11 excuse you again. Please don't discuss the evidence amongst
12 yourselves until you receive all of the evidence, the argument
13 of counsel, and the charge of the Court.

14 (Jury out.)

15 THE COURT: Just for clarity of the record, I struck
16 the last question and answer because the witness was testifying
17 on a matter about his own credibility on substance that is not
18 before the jury, and the jury has no basis upon which to
19 challenge the defendant's characterization of his prior
20 statements.

21 You are asking him about discovery matters, what you
22 are entitled to. I don't think that is a proper question to
23 this witness. So what is the purpose of this line of
24 examination?

25 MS. THOMPSON: I want to elicit from this witness the

1 fact that I cannot go in and do Google searches or image
2 searches on these different words, because if I were to happen
3 to come across child pornography, then I would be in possession
4 of unauthorized or illegal content.

5 THE COURT: I don't think that's even relevant. what
6 is the relevance of that? I don't understand the relevance of
7 that.

8 MS. THOMPSON: Well, one of the things he testified to
9 is that he has special training and knowledge as to what these
10 different words mean, what these different search terms mean,
11 such as the Vicky series. I want to question him about the
12 Vicky series and the fact that I, or my investigators, other
13 people that are not in law enforcement, are not allowed to view
14 this Vicky series or search it, Google search it, and see what
15 even comes up. That we have to depend solely on his opinion.

16 THE COURT: Are you saying that the defendant's
17 computer was not available for your inspection?

18 MS. THOMPSON: I am saying that when --

19 THE COURT: I mean, if there is a reference to the
20 Vicky material in his report of what saw, are you saying you did
21 not have access to the computer to look at it?

22 MS. THOMPSON: Yes, I had access to my client's --

23 THE COURT: Then I don't see what the problem is. I
24 don't see what the purpose of this is.

25 MS. THOMPSON: He testified that my client -- and it's

1 an exhibit, searched on the word Masha, M-a-s-h-a. So it would
2 be important to know, if you searched on the word Masha, what
3 kind of words come up are. Is it only child pornography? Or to
4 other images come up that one would not be put on notice that
5 it's child pornography? I cannot go in and do the search on the
6 word Masha, because if I were to bring up child pornography --

7 THE COURT: Yeah, but that's not the point about what
8 you could do on another computer. The question is whether you
9 could search his computer and see what the Sasha image revealed.

10 MS. THOMPSON: How can I cross examine him on the fact
11 that Masha is a term for child pornography? I have no
12 information about what Masha means, and my hands are tied. This
13 was one of my objections initially in my motion in Limine. He
14 says Masha means child pornography. I have no way of testing
15 whether or not his information is accurate or true. And he says
16 PTHC is child pornography.

17 THE COURT: Did you ask the government to produce all
18 of the films in his report as being found on the defendant's
19 computer? Did you ask him just to produce them?

20 MS. THOMPSON: I have a copy of all of the films
21 produced on my client's computer.

22 THE COURT: Do you have a basis, then, to challenge him
23 on whether those involve child pornography or not?

24 MS. THOMPSON: I thought most of the videos on my
25 client's computer were of adults.

1 THE COURT: Well, but you can ask him if -- I don't see
2 why you can't ask him what it is on this particular film that he
3 justifies for his conclusion that it's child pornography.

4 MS. THOMPSON: I want to specifically ask him about the
5 phrase Masha, and how did he come up with the idea that Masha is
6 a phrase used for child pornography.

7 THE COURT: You can ask him that question.

8 MS. THOMPSON: But what I also want to establish in
9 front of the jury is -- I can't cross examine him effectively
10 about whether he is right or wrong about what Masha --

11 THE COURT: That's what I'm trying to get to. If he
12 referred to this as a file name on the defendant's computers,
13 did you ask the government to produce all of the files or the
14 video for the file names that are on the defendant's computer?

15 MS. THOMPSON: There are no files named Masha on my
16 client's computer. He pulled it out of search terms only.

17 THE COURT: Well, if it's on search terms. Anything
18 related to the -- that they contend is child pornography or
19 evidence of child pornography, did they produce the film that
20 reflects the basis for it? Did you ask for it?

21 MS. THOMPSON: I asked them specifically to do a search
22 on the word Masha. I asked the government that, yes.

23 THE COURT: Well, did you ask for any video or images
24 that will reflect Masha or Sasha is -- constitutes child
25 pornography?

1 MS. THOMPSON: I have asked for those things in the
2 past, and I was told the Vicky series I asked -- I was told that
3 that the government cannot show me child pornography images that
4 were not specifically on my client's computer. So one of the
5 things --

6 MS. DAUGHTREY: That's not what the government said,
7 Your Honor.

8 THE COURT: Well, if you don't mind letting her finish.
9 I will give you a chance to be heard. Really, I will.

10 MS. THOMPSON: So one of the things I want to attack is
11 the government came up with search terms that were found from
12 Limewire on my client's computer. The government doesn't say
13 what they equaled. The government just said, he put in these
14 search terms, and they are indicative of child pornography. And
15 he testified that Desi -- Dee & Desi is a known term for child
16 pornography series of videos and photographs. And so I -- they
17 didn't testify that they found Dee & Desi on my client's
18 computer. But the government has put into evidence that a
19 search term for Dee & Desi is indicative of looking for child
20 pornography.

21 Now, if I want to cross examine him about this and
22 about what exactly comes up about Dee & Desi, I cannot do that
23 effectively because I do not know what comes up when you do a
24 Google search term for Dee & Desi. And therefore, I cannot
25 cross examine him about, isn't he wrong? Isn't Dee & Desi also

1 the name of a soft drink or a radio song? Because if I were to
2 type in Dee & Desi, I could be myself getting child pornography
3 on my computer or my expert's computer, whoever is trying to
4 type in this search word, and challenge the government's
5 contention.

6 THE COURT: Well, that's why I was asking, did you ask
7 the government for it? If they were going to rely upon it, did
8 you ask the government to produce the underlying information
9 that would establish these terms as child pornography? Did you
10 ask for it?

11 MS. THOMPSON: I have asked at some point. I'm not
12 sure how -- I have asked -- I think it was in another case that
13 was very closely related.

14 THE COURT: Let's only deal with the case that's before
15 me. Did you ask for it in this case?

16 MS. THOMPSON: I asked to see -- I put it in a pleading
17 that I wasn't able to see it. That I didn't know what the vicky
18 series --

19 THE COURT: That's not my question. Did you ask for
20 it?

21 MS. THOMPSON: I cannot specifically remember if I
22 asked for it.

23 THE COURT: We'll take a recess, and you look through
24 your papers and see if you made a request from the government
25 for all -- for the data upon which they relied that references

1 these as child pornography.

2 MS. THOMPSON: Yes.

3 (Recess.)

4 THE COURT: You may be seated.

5 Yes, ma'am.

6 MS. THOMPSON: Yes, sir. Yes, Your Honor. I made a
7 specific request in writing in a pleading that I filed, Document
8 Number 100, that was part of my motion in Limine. And it's
9 Issue Number 9, or it's Paragraph Section 9. And in this I
10 objected to the government putting on testimony about a
11 particular photograph or video series belongs to a -- or a
12 particular photograph or video belongs to a series of child
13 pornography such as the Vicky series or the Baby Jane series.

14 And I specifically asked that the government not be
15 allowed to testify to the fact that a picture belongs to this
16 series. And then in the alternative, I stated that -- I asked
17 to be allowed to review any other child pornography photographs
18 that the government intends to reference during trial that are
19 not in evidence in this case. I had specifically asked that,
20 Your Honor.

21 So the government has been allowed to testify that
22 these photographs -- that this photograph -- it's called My Nine
23 Year Old Cousin Sucks My Cock, something like that -- was part
24 of the Vicky series. I have not seen the Vicky series. And I
25 cannot cross examine him effectively on whether or not it really

1 is part of the Vicky series.

2 THE COURT: Well, the arrangement that was made when we
3 discussed this motion was that they would provide you a computer
4 that you could -- you and your expert could view, as you
5 requested, shortly before or shortly after each of those
6 proceedings, so it would give you an opportunity to view
7 whatever films they were referring to.

8 MS. THOMPSON: I think that was to review the
9 pornography that's alleged to be pornography on my client's
10 computer, Your Honor. This Vicky series, these other pictures,
11 were not on my client's computer.

12 THE COURT: No, you make reference to computer files it
13 intends to offer into evidence at trial. And these are file
14 names. Paragraph one of your motion. And that was the whole
15 purpose of telling the government to make a computer available
16 to you so you could do what it is we're discussing.

17 MS. THOMPSON: No, because even if they make that
18 computer available to me, Your Honor, other photographs of this
19 Vicky series are not on that computer. They are out there in
20 the Internet, or they are on Scott Levasseur's one million
21 images at his office. But they are not on my client's computer.

22 THE COURT: Okay. Bring the jury in, Mr. Marshal.

23 MS. DAUGTREY: Your Honor, may I respond before the
24 jury comes in?

25 THE COURT: Oh, yes, ma'am.

1 MS. DAUGHTREY: Thank you, Your Honor.

2 Your Honor, with regard to his identifying the Vicky
3 series, I thought we had dealt with that as part of the
4 defendant's expert opinion.

5 THE COURT: No, ma'am. The problem is, he is making
6 references -- giving testimony and giving conclusory references
7 without a predicate for it. He is saying, based on my
8 experience that this is a child porn website. Well, he provides
9 us no basis for it, other than the fact that he has been working
10 in this field.

11 MS. DAUGHTREY: Your Honor, think that's not correct.
12 I think he testified that he learned about the fact that Dee &
13 Desi and Masha were child pornography series in his training
14 through ICAC and through other -- well, through ICAC.

15 THE COURT: The training materials aren't available.
16 She has no basis to which to really meaningfully challenge that
17 statement. And if the films themselves aren't available to
18 provide a check on whether that's true or not, she is having
19 difficulty challenging this witness's statements and
20 characterization of these websites.

21 MS. DAUGHTREY: I understand that. But my
22 understanding was that Detective Levasseur offered for her to
23 come to his lab to do the searches that she wanted as well. And
24 particularly, I think she was talking to me about Masha.

25 THE COURT: That is completely new. That's the first

1 time it has come up.

2 MS. DAUGHTREY: Well, it's an offer that was made
3 before the trial began. That was my understanding.

4 MS. THOMPSON: I disagree with the characterization of
5 that, Your Honor. I had specifically asked, and I was told no.
6 I asked again on Monday afternoon. And so Mr. Levasseur never
7 invited me to come to his shop. And I specifically was asking
8 about these Masha photographs. And so I disagree that I was
9 given any an opportunity to view that. It was kind of a
10 run-around. He said ask Carrie. Carrie said, that's between me
11 and Levasseur. Levasseur said he would talk to Carrie and see
12 what she said.

13 THE WITNESS: I didn't say that.

14 THE COURT: Anything else?

15 MS. DAUGHTREY: No, Your Honor. The government can
16 provide those images and can provide information from the
17 National Center for Missing and Exploited Children that Masha
18 and the Desi & Dee series are a known child pornography series.
19 Detective Levasseur didn't testify to anything other than he
20 knows that those terms are associated with that. He didn't
21 testify that the defendant knew that, or that the defendant was
22 using it for that purpose. Just that he is aware through his
23 training and experience about that information.

24 And I would certainly be willing to take a recess and
25 allow Ms. Thompson to see that information that NCMEC has about

1 that.

2 MS. THOMPSON: They put those search terms in to show
3 intent of my client to look up child pornography. He didn't
4 just say, I had training on this subject. He said, these terms,
5 Google search on his computer, looking for child pornography, I
6 know what that means.

7 THE COURT: You can bring the jury in.

8 (Jury in.)

9 THE COURT: Ladies and gentlemen of the jury, I really
10 do hate to do this, but I'm going to have to declare a recess
11 for today. An issue has arisen that the Court believes requires
12 an extended period of time. And rather than having you all
13 twiddling your thumbs in the jury room, I just think it's better
14 to send you all home for the day. We were also concerned about
15 this weather pattern that's supposed to be coming through a
16 little bit later today and whether that posed any personal
17 safety issue for any members of the jury as well as others.

18 So I'm going to send you home for the day, ask you to
19 come back at 9:00 in the morning, and we'll try and get started
20 promptly.

21 Once again, please do not discuss the case with anyone
22 else, including your fellow jurors, family or friends, until you
23 receive all of the evidence, the argument of counsel and the
24 charge of the Court. Please do not conduct any electronic
25 research of any kind concerning any of the issues or matters or

1 persons involved in this lawsuit.

2 If you will hand your exhibits to the Marshal, he will
3 take custody of them until you return. If you will come back at
4 9:00 in the morning. Thank you.

5 (Jury out.)

6 THE COURT: All right. I'm going to require the
7 government to produce any file requested by the defense, file
8 name, search name, that was -- that this witness testified and
9 that the defense wants to see, any supporting underlying data of
10 whatever sort, to support the characterization of those sites or
11 those words as child pornography files. And they will be made
12 available to the defense counsel and the defense counsel's
13 expert. And they are to be made available immediately.

14 We're in recess until nine in the morning.

15 (Recess.)

16 THE COURT: Before we get started, there is no court
17 reporter present, but I have my recording system from my days as
18 a magistrate judge. And given that this is a conference and not
19 proof, we will proceed on that basis unless there is an
20 objection. The court reporter can make a transcript from this
21 on the request of any party. Without objection.

22 MS. THOMPSON: I think, Your Honor, I do not believe
23 that the government is going to be able to give me what I have
24 requested, because it was my understanding from the way that
25 Mr. Levasseur spoke that when he said he had had training on the

1 Vicky series, I understood that to mean that he had already seen
2 a series of photographs at one of his trainings or conferences.
3 Somewhere it had been laid out in front of him a lot of
4 photographs or videos and said this is part of the Vicky series.

5 I think what IT turns out to be, that if he at sometime
6 in his work has run across a photograph, he sends a hash value
7 in, it comes back and says, that picture has been identified as
8 one of the Vicky series. But he is sending that on a hit or
9 miss basis, just as he gets feedback over time. He has never
10 seen the entire series.

11 And also, he doesn't have with him the ability to pull
12 these pictures up by a known name. So even though may have a
13 million child pornography photographs or I'm paths, videos in
14 his lab, they have been stripped of all their names that they
15 came with. And so he can't go in there and do a search for
16 these videos by name.

17 And the NCMEC database that is head of all this, and
18 really categorizes everything, never sends out videos. So at
19 this point I could -- I'm not going to be able to look at these
20 pictures, the Dee & Desi and the Masha pictures. They might be
21 able to find for me one or two examples, but it's my
22 understanding that these are coming from Scott Levasseur's
23 memory. He doesn't keep any of his NCMEC reports, and he
24 doesn't have names that he has filed. So it would have to be
25 from his personal memory as to whether or not one of these

1 pictures fits in.

2 And at this point, Your Honor, I feel like this has
3 really tainted the jury. He has testified that he had training
4 in this area. Apparently when he goes to these ICAC training
5 sessions, they never even show photographs. They just talked
6 about numbers and techniques to get things off the computer. So
7 he has been certified as an expert in child --

8 THE COURT: No, he wasn't. He was permitted to testify
9 as a person with specialized knowledge.

10 MS. THOMPSON: Okay. Okay. But apparently he
11 hasn't --

12 THE COURT: Daubert does not literally apply to
13 specialized knowledge as it does to expert testimony.

14 MS. THOMPSON: Okay. I object to what has already been
15 said to the jury now, Your Honor, because I think that it has
16 tainted the jury. And I think he gave the impression that he
17 had seen these pictures and was familiar with this whole series.
18 He also testified about Masha and Dee & Desi. And the --
19 something he said was Russian, Lolita something.

20 Your Honor, at this point I'm asking for a mistrial
21 with prejudice.

22 MS. DAUGTREY: Your Honor, the specialized knowledge
23 that Detective Levasseur has is based on his -- both his
24 training and his experience. I think all of this information
25 that Ms. Thompson is talking about is perfectly appropriate for

1 cross examination. But we sat and we tried to --

2 THE COURT: Is there any dispute to her
3 characterization that he has actually never seen any of the
4 videos associated with these files and search terms?

5 MS. DAUGHTREY: There is absolutely no truth to that.
6 what he can get -- I can have him get on the stand and explain
7 to Your Honor. what happens in these cases is that when he's
8 doing these undercover examinations, what he will do is he will
9 run across these very long file names. And one of them, for
10 example, might have the name Masha in it. And he sees a
11 particular person in that file. And then as he continues with
12 his investigations. He sees Masha coming up again and again.
13 And he sees that that's the same person that was in the other
14 file. And it becomes -- it's something that it's not like an
15 official series name, but it's what everybody begins to know
16 this particular person as in both the files, both the people who
17 are downloading them for law enforcement purposes and for nonlaw
18 enforcement purposes.

19 This is all sort of over time in his experience. And
20 he has seen images of these different individuals. what he
21 doesn't have is a database that says, this is the Masha series,
22 and these are the images that are related to it. Because how
23 this works is he goes out and he gets a computer that has
24 suspected child pornography on it. And he sends the hash values
25 of all these images up to an organization known as NCMEC, which

1 is the National Center for Missing and Exploited Children. They
2 are the ones who have a centralized database. And their
3 database consists of -- these are all the hash values of
4 potential child pornography or known child pornography that we
5 know of. These over here in this corner have been identified as
6 including the child Masha in it.

7 And if Scott Levasseur sends up a hash value that's
8 equivalent to one of those, then NCMEC is going to send him
9 information and say, this is from a series known as Masha, this
10 is the investigator that did this case, here's his contact
11 information.

12 And so he has over time both seen it through his
13 investigations but also gotten these reports back from NCMEC
14 that say, yes, this is a child known as being associated with
15 this Masha series.

16 So the problem is, they don't -- they can't -- they
17 don't save their files. They only save the hash values. what
18 they do have that Scott Levasseur didn't rely on but that I am
19 working on trying to get right now, is they have information
20 about each of the series that they know about. So, for example,
21 they will have -- they will have some information up there that
22 I can -- that I am working trying to get for Ms. Thompson that
23 says there is a known series by the name of Masha, and here's
24 what this series looks like. And they will give you a written
25 description of that series, along with who the investigator is.

1 So that's probably the best database that we can give
2 to her in terms of files that she wants. We have also offered
3 that she and her expert can go to Scott Levasseur's lab and do
4 whatever research that they want to do on that computer. The
5 problem is, it depends on what day you are doing the research on
6 what you are going to find. If you are doing research on Masha,
7 you may find a child pornography file that is of Masha or isn't
8 of Masha. The only way to tell if it is, is to send that file
9 up to NCMEC, ask them if it's the same hash value as something
10 they have connected with that series, and that takes time to do.

11 So that's the reason why there is not really any
12 information that can be directly provided. It's not like Scott
13 Levasseur has, you know, a very organized database that says,
14 you know, this is the Masha series. This is something that he
15 has learned over time in his experience both doing the work and
16 talk talking to other law enforcement and understanding from
17 training how this kind of thing works.

18 I would respectfully suggest that a mistrial is totally
19 inappropriate. She can certainly cross examine him on this
20 information, where he got his specialized knowledge, ask him if
21 he has seen every single series picture that's there, that kind
22 of thing. And I'm happy to provide the NCMEC information today
23 if I can find it and to allow them to do whatever search they
24 want to on his computer.

25 I don't think -- and I think even Ms. Thompson's expert

1 has admitted that doing that is probably not going to be very
2 beneficial. what Jennifer wants -- what Ms. Thompson wants is
3 something that's just really not available out there.

4 MS. THOMPSON: So as I understand things, not even the
5 NCMEC database has images in it. And so in terms of knowing
6 what is out there, nobody can get me any images of any of these
7 series of child pornography that have been referred to. All
8 they have is some numbers hash values that sometimes match
9 pictures.

10 But I do believe that it's accurate to say that
11 Levasseur, Mr. Levasseur, has not sat and seen a series or been
12 presented with pictures and been told then that these match
13 NCMEC. Or sorry, and that this is what the Vicky series is.

14 As the government even said, it just happens to be
15 when he sees a picture with the name Masha, and then he begins
16 to refer to it as the Masha series. Well, the picture he
17 identified as being the Vicky series in this didn't even have
18 the name Vicky in it. It was something about my nine year old
19 cousin.

20 But there is no misunderstanding that when he testified
21 about these series that he gave the distinct impression that
22 through his training and his information, he had known what
23 these series are. And now it's really just a lot more about
24 kind of over time assuming that these names go with these
25 pictures and we know that they have come back with hits.

1 I specifically asked the government for the NCMEC
2 information that goes with the photographs in this case, and I
3 was told that they don't ever give out NCMEC information. But
4 now I question whether or not this picture actually -- the
5 picture that they have identified as the vicky series thumbnail
6 ever actually came back from the NCMEC with a matched hash
7 value.

8 Your Honor, we cannot undo this with the jury.
9 These jurors do not like being in a child pornography trial.
10 They are -- everybody's quick to think that is a bad thing.
11 They have a much harsher judgment than they would on a different
12 type of case or drug case. The government cannot undo this now
13 by just simply letting me cross examine him. They need to say
14 that what he said before was inaccurate and gave the wrong
15 impression. I'm asking for a mistrial with prejudice.

16 MS. DAUGTREY: Your Honor, there was not a NCMEC
17 report in this case. Ms. Thompson asked for the contact
18 information of the investigator that we have coming to testify
19 in the vicky series. We provided that information to her. He
20 is here. And that information was provided to her.

21 With regard to -- we can go back and look, but I don't
22 think that Detective Levasseur said, I know these search terms
23 are child pornography or that this particular name Masha is a
24 known child pornography series because I learned it from an ICAC
25 training. We can go back and look at the --

1 THE COURT: Yeah, but I mean that was the whole
2 predicate to allow him to even give that testimony.

3 MS. DAUGHTREY: Well, I think the predicate for it was
4 both his experience and his training. I think that's the
5 predicate for it. He has specialized knowledge.

6 THE COURT: The last description you have you gave me
7 is that he talked to other people who say, yes, this is a sex
8 file. So that's not training or really experience. That's just
9 what somebody else told him.

10 MS. DAUGHTREY: Well, these are other law enforcement
11 officers that discuss it as part of his experience, Your Honor.
12 People begin to recognize the same person over and over and over
13 again. And that's how we identified this particular Vicky
14 thumbnail. Went up to NCMEC and they didn't hit on it. But he
15 recognized the girl in there as being Vicky. Just like he's
16 doing this over the course of time and begins to recognize the
17 same images and or the same videos or the same child that's in
18 here.

19 All of this is something that's subject to cross
20 examination. There has been no misleading of the jury at this
21 point. We certainly haven't gotten into the kind of detail that
22 they were talking about here about how he knows it with the
23 jury, and I think that's perfectly legitimate cross examination.
24 There is no misleading that has happened in this case.
25 Anything Ms. Thompson wants to ask him on cross examination,

1 that's the whole purpose of cross examination is to get into
2 those details that she wants to get into.

3 THE COURT: Well, Daubert doesn't apply -- it's not --
4 Daubert does not apply in toto or literally to specialized
5 knowledge testimony. That does not mean that Daubert's factors
6 are not to be considered on specialized knowledge testimony.
7 And the linchpin of both the Supreme Court cases is indicia of
8 trustworthiness. And the experience and the opinions can be
9 subject to some level of scrutiny to test the reliability of the
10 opinions expressed.

11 I'll tell you what. I will ask counsel to put him on
12 to testify on the actual predicate bases for his expressions --
13 for his opinions that several of the file names and several of
14 the search terms that he described as child pornography are, in
15 fact, are the basis for those opinions.

16 MS. DAUGTREY: Thank you, Your Honor.

17 Before we get started, I don't really mean to sound
18 preachy, and I don't like to, but that was the purpose -- what
19 we're doing now was the purpose of the earlier out of court
20 hearing, to allow defense counsel an opportunity to voir dire on
21 the witness's qualifications as either an expert or a person
22 with specialized knowledge. But given the fact that there are
23 subsequent representations about what is -- what information, in
24 fact, is available or was made available and what the training
25 of the witness actually is, and the bases for the witness's

1 opinion testimony, what those bases are, the Court decided to
2 hold this hearing on whether the witness's opinions have an
3 adequate basis as measures or measures of reliability to be
4 admitted. So I will allow you to recall the witness and do your
5 voir dire.

6 MS. THOMPSON: Yes, Your Honor.

7 THE COURT: If the witness will come around. You are
8 still under the oath you have been administered.

9 EXAMINATION

10 BY MS. THOMPSON:

11 Q. So I'd like to go back again to your training
12 that you had in terms of child pornography and the
13 identification of child pornography. Let me ask you again, we
14 have referred to a curriculum vitae that you prepared in
15 preparation for today's testimony. And in that you had listed
16 your training that you have in this area. So in -- can you give
17 me a general overview of the type of training you have had in
18 identifying child pornography?

19 A. I had no training in identifying child
20 pornography.

21 Q. okay. So when you use the -- there's two
22 different databases, I believe, that you have been referring to.
23 One was the NCMEC database; is that correct?

24 A. One is the what, ma'am?

25 Q. NCMEC database.

1 THE COURT: Can you spell out the acronym for the court
2 reporter?

3 BY MS. THOMPSON:

4 Q. It stands for the National Center for Missing
5 and Exploited Children; is that correct?

6 A. I refer to that, yes.

7 Q. Okay. And in this database, it is correct that
8 they keep hash numbers?

9 A. Hash values.

10 Q. Hash values. And these are a number or a value
11 that has been given to individual pictures; is that correct?

12 A. Correct.

13 Q. Now, when we were talking outside the courtroom,
14 you said that the NCMEC database never sends you photographs or
15 videos in response to a request. Is that right?

16 A. Correct.

17 Q. So what happens is you send in a photograph, or
18 a number, a hash value, off of one of these pictures to NCMEC,
19 and it returns a result to you; is that correct?

20 A. No, ma'am. I actually send the actual file, be
21 it an image or a video file, to NCMEC. And then they return
22 back to me with any known hits.

23 Q. I thought you said earlier when we were talking
24 that you just send them a hash value?

25 A. I didn't say that. Somebody else in the circle

1 said that. I didn't.

2 Q. So you send them a digital file?

3 A. I send them either CDs or DVDs with the files on
4 them. Or if there's a whole lot of them, you can send an
5 external hard drive to them.

6 Q. Okay. And then they send you back a report; is
7 that right?

8 A. Correct.

9 Q. Okay. And then there is another way that your
10 -- there is another database you are using, and that's the ICAC
11 database; is that correct?

12 A. For what purpose, ma'am?

13 Q. Suspected child pornography files?

14 A. No, ma'am. I don't have access to that
15 database. The software that I use in peer-to-peer
16 investigations has access to that database, but it doesn't
17 present us with files.

18 Q. Okay. So can we go back through your training,
19 then, as to your training that you have had in the child
20 pornography area. You said you have had no training on
21 identifying pictures of child pornography?

22 A. The only training that I have had through ICAC
23 that pertains to child pornography is peer-to-peer
24 investigations.

25 Q. So they told you how to use software to contact

1 other people and download files; is that right?

2 A. They taught you everything that you needed to
3 know about the networks, how the networks work, the software
4 that you are going to use, how to operate the software. They
5 instruct you with how to make a case, how to work your case, how
6 to make your case all the way through to the prosecution. They
7 instruct you with key words to use to search for child
8 pornography.

9 And then you actually in the classroom get on, using
10 your software, connect to the Gnutella network, and make
11 downloads from other people out in the world on the network as
12 part of your training.

13 Q. Okay. And so in those cases, then, you are
14 simply working with software, and they have trained you on
15 connecting to other people that are out in the Internet cloud;
16 is that right?

17 A. On the Gnutella network; yes, ma'am.

18 Q. So in this period of peer-to-peer training, they
19 would have explained to you what a torrent is and how a bit
20 torrent works?

21 A. That would be a particular class. Bit torrent
22 class is a totally separate training from Gnutella training, the
23 same way that Aries network, Aries training. It's peer-to-peer.
24 And Bit Torrent is peer-to-peer, but it's totally separate
25 training.

1 Q. But when I was referring to torrent, I was
2 referring to the word that means how this data is transferred
3 from peer-to-peer network station, not a particular software.
4 It's transferred in torrents; isn't that correct? Blocks of
5 data that are sent from one computer to the other?

6 A. No, ma'am. Not on the Gnutella network.

7 Q. okay.

8 THE COURT: Let me see if I understand your
9 explanation. Your training, then, is really just on how to
10 search computers that may contain child pornography, and also
11 training on how information is shared on that computer with
12 other computers.

13 THE WITNESS: How to locate people that are
14 trafficking, and then how to receive the child pornography files
15 from them and build your case. As far as child pornography, I
16 have had no specific training where they showed you pictures.

17 THE COURT: So you have not received any training on
18 identifying images that you capture as to whether they are
19 children or not?

20 THE WITNESS: No, sir.

21 THE COURT: Have you received any training on -- by
22 experience -- how extensive has been your experience in
23 identifying whether an image that you may see is associated with
24 a file that has been determined to be child pornography?

25 THE WITNESS: In my years of doing this, every time

1 that I do a forensic exam on a computer, when I collect the
2 child pornography files, I send them to NCMEC. And NCMEC
3 returns a report with a series name and then the hash values
4 related to the files that I sent them of known children,
5 children that have been identified as actual victims, and --

6 THE COURT: Yeah, but you don't do the determination of
7 the hash value?

8 THE WITNESS: The hash value is irrelevant, really.
9 It's just something for them --

10 THE COURT: That wasn't my question. My question was,
11 do you determine the hash value of an image?

12 THE WITNESS: There's a hash value to every file; yes,
13 sir.

14 THE COURT: I got that part. But your training doesn't
15 involve you making that -- assigning that value, does it?

16 THE WITNESS: No, sir.

17 THE COURT: Somebody else does that. And then they
18 tell you whether it's a match or not?

19 THE WITNESS: Correct.

20 THE COURT: And a match is only based on hash value?

21 THE WITNESS: It only matches a known hash value; yes,
22 sir.

23 THE COURT: All right. Any further questions?

24 BY MS. THOMPSON:

25 Q. Yes, sir. When you are talking about matching

1 hash values, there were no NCMEC hash values matched in this
2 case; is that correct?

3 A. Correct.

4 Q. And so when you are talking about even detecting
5 suspected child pornography, you are using a database that
6 individual law enforcement officers have made for themselves; is
7 that correct?

8 A. In the ICAC.

9 Q. ICAC is like a group of people that are all
10 members of this ICAC organization; is that right?

11 A. Task force; yes, ma'am.

12 Q. So when you, yourself, run across a picture that
13 you think looks like child pornography, you will upload it to
14 your personal ICAC database; is that right?

15 A. It's not an ICAC database.

16 Q. It's your personal child pornography database?

17 THE COURT: Well, let him explain what it is. That
18 helps me. What is it? What is the ICAC base? What is it?

19 THE WITNESS: The ICAC -- the only law enforcement
20 officers authorized to do child pornography investigations are
21 members of the ICAC Task Force. And you have to be licensed
22 through ICAC in order to operate and use this software for child
23 pornography. They have a server. ICAC has a server. And at
24 this time the server was based in Wyoming with the law
25 enforcement in Wyoming. And they had all of the Shaw values of

1 all of the known child pornography values out there. Images or
2 videos of children that had been identified. And they were
3 called known files. And then they had a list of suspected child
4 pornography files. Children who were, in our terms, were
5 obviously children, but they were not identified. Nobody knew
6 who they were.

7 So they kept that database. So when we would do
8 investigations, we would automatically load that server, that
9 computer server in Wyoming, with data of IP addresses, computers
10 that were trafficking in known or suspected child pornography
11 files.

12 So when we say the database, it's actually just a big
13 server that belongs to the Wyoming ICAC.

14 THE COURT: So what comes off of that server is either
15 a file that is suspect or a file that has a Shaw value?

16 THE WITNESS: All of the files have Shaw values, but
17 they are identified as either known or suspected.

18 THE COURT: So the Shaw value doesn't provide you any
19 basis to determine whether it is child pornography or not?

20 THE WITNESS: That's the thing. They have the Shaw
21 value, and they say that this Shaw value is child pornography.
22 In my lab, I have a database that has all of the child
23 pornography files that I dealt with that has the Shaw values. I
24 can look at the ICAC's Shaw value, go into my database and pull
25 up that Shaw value, look at the file, and know that the Shaw

1 values are the same, so it's the same file that they have, and I
2 have it here. And that's to prevent from having to transport.

3 THE COURT: Yes, but some of the files -- if they all
4 have Shaw value, some files have Shaw value that are only
5 suspects; right?

6 THE WITNESS: That are not known -- that are not
7 identified children; correct.

8 THE COURT: They don't know whether they are children
9 or not, but they have a Shaw value?

10 THE WITNESS: Correct.

11 THE COURT: So just because you have something with a
12 Shaw value, and Wyoming has a Shaw value, that does not
13 establish that the people -- that the images are children?

14 THE WITNESS: That's why as an investigator working
15 these crimes, you have to view the file and make your
16 determination on if it fits as being a child.

17 THE COURT: Okay. Now, what is your -- I thought you
18 said earlier you did not have any training in determining
19 whether the image on the picture on the image was a child or
20 not.

21 THE WITNESS: There is no classroom training on
22 identifying child pornography. The only training that I have is
23 my daily work experience from viewing these files. It's -- when
24 you look at a prepubescent child, it's obviously a child. So
25 even though it's not known, the victim is not known, as a human,

1 you know --

2 THE COURT: Well, why would there be unknown files in
3 there, suspect files?

4 THE WITNESS: Because a lot of child pornography comes
5 from different countries. And these cases were never worked,
6 the children were never identified, so we don't know who they
7 are. And that's why we submit -- like, I could make a child
8 pornography file -- movie file today. Let's just say I went
9 home and I filmed my daughter doing sexual activity and loaded
10 it on the Limewire and shared it. Then the police did a search
11 warrant, got the guy's computer, and looked at the file, and
12 it's an obvious child. Well, it's not known. It's in no
13 database anywhere, because nobody has come across it before, and
14 the child is not identified.

15 BY MS. THOMPSON:

16 Q. So these pictures are not subject to peer
17 review; is that right? If you look at something --

18 A. Yes, ma'am. When you submit -- when -- if I
19 submit them to the ICAC server --

20 Q. Yes.

21 A. -- they look through them and make their
22 determination whether they want to add them on. But again,
23 that's their opinion.

24 Q. Okay. But if they decide if they want to --
25 when you say they, who is they?

1 A. People who work in that department.

2 Q. So it could be one person or multiple people?

3 You don't know?

4 A. Correct.

5 Q. And so when this mysterious "they" entity
6 reviews it, nobody goes back behind the "they" entity and makes
7 sure they didn't make a mistake, do they?

8 A. That's why you are trained in the training --

9 THE COURT: Answer the question first. Restate your
10 question.

11 BY MS. THOMPSON:

12 Q. Nobody goes behind the "they" entity --

13 A. I don't know.

14 Q. -- to double check?

15 THE COURT: Let already finish the question?

16 THE WITNESS: I just -- I don't know if somebody goes
17 behind.

18 THE COURT: It would be helpful, sir, if you would
19 allow her to finish the question, answer the question as asked.
20 If there is any need to answer anything else, your lawyer can
21 get up and ask a question, okay? So let's try it one more time.

22 Ask your question.

23 BY MS. THOMPSON:

24 Q. So when the "they" entity adds a picture to this
25 database, there is nobody that double checks to make sure they

1 -- that the "they" entity didn't make a mistake?

2 A. I don't know, ma'am.

3 Q. Okay. And so if it turns out that something got
4 uploaded, and later it's discovered that it was uploaded in
5 error, and later it's discovered that that file, in fact, is an
6 adult, you don't know of any method to correct an error entry in
7 the ICAC database?

8 A. Yes, ma'am. If I discover a file that I don't
9 think is a child on the -- that they are listing, I have a
10 method to contact the ICAC administrators up there and say,
11 review this file.

12 Q. Okay. So but this is just based on your
13 personal opinion. And you would contact them and say, I don't
14 think this is a child?

15 A. Correct.

16 Q. And you don't know what method they use to
17 determine whether they are going to remove the picture from the
18 collection or not?

19 A. I don't.

20 Q. And so your opinion -- you have developed your
21 knowledge of child pornography simply by experience of just
22 looking at a lot of photographs over time?

23 A. Correct.

24 Q. Okay. But with no feedback as to whether you
25 are making correct decisions or incorrect decisions?

1 A. I don't guess so.

2 THE COURT: Have you had any training on distinguishing
3 whether there has been any digital manipulation of an image?

4 THE WITNESS: I have not, sir.

5 MS. THOMPSON: No further questions.

6 THE COURT: Any further questions of this witness?

7 EXAMINATION

8 BY MS. DAUGHTREY:)))

9 Q. Detective Levasseur, how is a hash value created
10 from a file?

11 A. It's an algorithm that's run against the file.
12 And it -- I mean, --

13 Q. Is it something that somebody -- a person does?
14 Or is it an automatic type of thing?

15 A. It's in the software. Like --

16 THE COURT: Did your computer training allow you to
17 determine the hash value of an image?

18 THE WITNESS: Through my --

19 THE COURT: Through your training.

20 THE WITNESS: Through my training?

21 THE COURT: Can you determine, independent of what some
22 other places do, can you determine a hash value -- do you have
23 the skill set to determine a hash value?

24 THE WITNESS: Yes, sir.

25 BY MS. DAUGHTREY:

1 Q. And when you are talking about known hash values
2 and suspected hash values -- I'm not sure it's clear -- what is
3 the difference between known -- what does known mean?

4 A. Known means that the child in the image has been
5 identified and has been positively identified as being underage.

6 Q. Okay. How many of those kind of files have you
7 seen in the course of your work doing this?

8 A. Thousands upon thousands.

9 Q. And the known child pornography or the known
10 hash values, those are in both the database -- the ICAC database
11 and NCMEC; is that correct?

12 A. Correct.

13 Q. Okay. So they are the same?

14 A. Correct.

15 Q. Okay. They may not have all of each one, but --

16 A. Correct.

17 Q. But they can be in either or both. The
18 suspected child pornography -- is that something that you all
19 use as a tool? Or are you expecting to use that in a court of
20 law?

21 A. We use it as a tool. I will download suspected
22 child pornography files to view them. And if they are
23 obviously, to me, prepubescent children, I will include them as
24 part for the case.

25 Q. All right. I want to take you back to something

1 we were talking about this morning that was of concern after the
2 jury was dismissed. You testified just a few minutes ago that
3 in your training to do peer-to-peer investigations, that you are
4 instructed on key words that you use to search for child
5 pornography.

6 A. Correct.

7 Q. I would like to ask to pull Exhibit 9, please,
8 and ask that that be handed to the witness. In that Exhibit 9,
9 from that list, what search terms did you learn in your ICAC
10 training -- what search terms on that page did you learn or were
11 told were key words to use to search for child pornography?

12 A. I specifically remember being taught to use
13 Mafia Sex, Years, Dee & Desi, PTHC, pedo, LSM. I specifically
14 remember those terms.

15 Q. What about Preteen?

16 A. Oh, I missed that one. Yes, Preteen.

17 Q. And what specifically were you told about those
18 words when you were in your ICAC database training?

19 A. You have a good likelihood of returning child
20 pornography hit results.

21 Q. Okay. Were you ever formally taught that these
22 search terms were associated with a particular child or
23 children?

24 A. No, ma'am.

25 Q. As part of your training, were you ever

1 instructed, this is a list of child pornography series names?

2 A. No, ma'am.

3 Q. Do you remember the first time that you heard
4 the term Mafia Sex when you were trained on it?

5 A. Yes, ma'am.

6 Q. Had you ever heard that term before?

7 A. Had not.

8 Q. Did you know what it meant at that time?

9 A. Before seeing the file name, no, I didn't. But
10 in the training, I learned what it --

11 Q. Okay. Did you ever use it as a search term
12 looking for child pornography?

13 A. Numerous times.

14 Q. And what happened when you used it?

15 A. I would always get back some child pornography
16 hits.

17 Q. Okay. Were they similar in nature ever, the
18 hits that you got?

19 A. A lot of the files were of the same children in
20 different movies or different images. But in the same respect,
21 I would get files back that weren't the same children at all.
22 Different altogether.

23 Q. Is that term, Mafia Sex, informally known by
24 people who work these cases as being a series?

25 A. It is.

1 Q. what do you mean by series?

2 A. A series is just a bunch of different pictures
3 or videos of the same child or children. And it's just a term
4 we use to correlate them altogether as saying instead of a
5 collection, the term just was being used in ICAC, a series. And
6 it just means that the same victims are in these different
7 videos and different images.

8 Q. we've talked about NCMEC. When you send your
9 child pornography up to NCMEC, do you ever get information back
10 from them that corresponds with the series in your
11 investigations?

12 A. Sometimes I do.

13 Q. Give us an example.

14 A. For example, in the Vicky series I recall
15 getting results back on that series.

16 Q. How many different series -- I mean, do you see
17 one or two from NCMEC? Or do you see more than that?

18 A. I don't know how many series there are in the
19 NCMEC database. There's a lot. But I'm pretty familiar with
20 eight, ten series.

21 Q. Were you familiar with the Vicky series at the
22 time that you investigated this case?

23 A. Yes, ma'am.

24 Q. And did you see an image on Mr. Tummins'
25 computers that you believed to be from that series?

1 A. Yes, ma'am.

2 Q. And what did you do to verify that?

3 A. Because I see the child that's in that Vicky
4 series in almost every examination that I do for child
5 pornography. It's very widely traded. I knew that she was a
6 known child, and I searched my records and found contact
7 information for the agent that worked the case. And I called
8 him and asked him if he would -- if I sent him a picture if he
9 would identify it for me, if it was his victim that he worked
10 from the Vicky series. And I sent it to him, and he responded
11 back that he knew who she was.

12 Q. So you even in your investigation will go as far
13 as to verify known children; is that correct?

14 A. Could you say that again, ma'am?

15 Q. In your investigations, you verify known
16 children?

17 A. Yes.

18 MS. DAUGTREY: Okay. I believe that's all I have.
19 Thank you.

20 THE COURT: Did I understand you to testify earlier
21 that when you get hash values, that there is no way to determine
22 from the hash value whether it's suspect or a known? Is that
23 right?

24 A. The ICAC is the ones that determines -- not
25 ICAC, excuse me, NCMEC, National Center --- they determine --

1 they make the determination on if it's a known child or if it's
2 a suspected child pornography. So when they send back their
3 report, they are not going to send me the images. So instead of
4 sending the images, they send the hash value.

5 THE COURT: I got that part. But is there anything in
6 the hash value that you get back to reflects it's known or
7 unknown?

8 THE WITNESS: No, sir. Not in the hash value.

9 THE COURT: Not in the hash value. Do you know what
10 the hash value represents?

11 THE WITNESS: It's a digital fingerprint for that
12 particular file.

13 THE COURT: Is it a result of the examination of the
14 image?

15 THE WITNESS: Could you say that again, sir?

16 THE COURT: It is a result of the examination of the
17 image?

18 THE WITNESS: It's just an algorithm that's run against
19 the file. I make my own hash value when I do my computer
20 forensic exam.

21 THE COURT: What are you measuring with the hash value?
22 What is it that you are measuring?

23 THE WITNESS: The algorithm is gathering all the data
24 within the file. And it's making a value for that file that's
25 unique to that file. The numbers in that hash value, the

1 letters in that hash value, are totally random if look at them.
2 They don't hold any information as to file name or what it is.
3 It's just a value that's given to the file.

4 THE COURT: I got the part that it's a value. I
5 understand that. What I'm asking you is, what is it that it's
6 measuring to come up with an assigned value? What it is that
7 they are measuring?

8 THE WITNESS: I don't know how the algorithm works.
9 It's extremely complex. It's a mathematical algorithm that does
10 it. And I'm not smart enough to tell you how it works.

11 THE COURT: Anything else?

12 MS. DAUGHTREY: Yes, I would like to ask one follow-up
13 question.

14 BY MS. DAUGHTREY:

15 Q. So it's clear that the hash value itself doesn't
16 tell you this is or isn't child pornography?

17 A. Correct.

18 Q. If you have a hash value for a file, how do you
19 figure out whether or not it's known child pornography or
20 suspected child pornography or something entirely different?

21 A. We're relying -- me as an investigator, I'm
22 relying on NCMEC and ICAC databases that are saying that that
23 hash value represents a child pornography file. So I download
24 that file. But then I have to view that file and determine
25 whether it is child pornography or not.

1 Q. So are you comparing the hash value of the file
2 that you have with the hash value of the file over here in the
3 NCMEC database?

4 A. Correct.

5 Q. Is it possible for one file to have more than
6 one hash value?

7 A. No, ma'am.

8 Q. Okay. If two files have the same hash value,
9 does that show that they are --

10 A. They are the same file.

11 Q. -- they are the same file. Okay. Thank you.

12 MS. THOMPSON: I have some more questions, Your Honor.

13 FURTHER EXAMINATION

14 BY MS. THOMPSON:

15 Q. So as I understand your testimony today, you are
16 saying that when you went to these classes and they trained you
17 on how to search for child pornography, and they gave you these
18 search terms, that they trained you to use to type in, so that
19 -- I think you said earlier so you could find child pornography.
20 Is that what you said?

21 A. Correct.

22 Q. Okay. They told you search on the term Mafia
23 Sex; is that right?

24 A. Correct.

25 Q. But it's your testimony today that at this class

1 they never told you why?

2 A. I testified that they told me that it would
3 return child pornography files.

4 Q. But they didn't give you any other background
5 information except that Mafia Sex will give you child
6 pornography?

7 A. Correct.

8 Q. And it's your testimony today that they never
9 trained you that Mafia Sex was a well-known series of child
10 pornography?

11 A. I've never had any training on a particular
12 series or what images are in series. I've had discussions at
13 trainings with other officers about different series. But as
14 far as PowerPoint on this is this, this is that; no, ma'am.

15 Q. So when you had training with other officers
16 about different series, no one pulled out pictures and said,
17 these pictures represent this series?

18 A. No, ma'am.

19 Q. Okay. And so you testified before the jury that
20 this Mafia Sex is a search term you put in, and that's a
21 well-known series of child pornography?

22 A. Correct.

23 Q. But you didn't get that information from any of
24 your training? Is that what you're saying? That to type --
25 that's why you would type in that search term?

1 A. Could you say that again?

2 Q. You weren't -- your training didn't tell you,
3 type in Mafia Sex because it's a search term that represents a
4 well-known series of child pornography?

5 A. No. The training taught us to type in Mafia Sex
6 to get child pornography. And in my interaction with other ICAC
7 officers, we know that Mafia Sex is a series.

8 Q. But to be clear, you know what you think that
9 series represents. And other people know what they think Mafia
10 Sex series represents. But you have never all gotten together
11 to make sure you are talking the same series of pictures;
12 correct?

13 A. There has never -- no, ma'am. There has never
14 been any training like that.

15 MS. THOMPSON: Okay. No further questions.

16 THE COURT: Of the files, of the search terms that you
17 identified in your direct testimony, how many of those search
18 terms have you previously confirmed as known child pornography
19 -- as known children? Pornography involving known children?

20 THE WITNESS: The search terms that are in this report?

21 THE COURT: Uh-huh.

22 THE WITNESS: Every one of them that I just named off
23 here off this paper, I've gotten known child pornography from
24 those search terms.

25 THE COURT: Okay. But did I also understand you to say

1 that there are images in the Mafia series that do not contain
2 child pornography?

3 THE WITNESS: Could you say that again, sir?

4 THE COURT: Did I understand you to testify that there
5 are images in the Mafia series that are not known to contain
6 child pornography?

7 THE WITNESS: Correct, sir. A search term --

8 THE COURT: The fact that it's a Mafia search term
9 doesn't automatically mean it's child pornography?

10 THE WITNESS: Correct.

11 THE COURT: Could be or could not be?

12 THE WITNESS: It could be adult porn. It just -- when
13 you do the search term to get the files, you may get all kinds
14 of different files, not necessarily all child porn.

15 THE COURT: So in the earlier description of search
16 terms, it wouldn't be accurate to say that every time you use
17 those terms, you will get child pornography. That's not
18 accurate, is it?

19 THE WITNESS: That would be an accurate term, because
20 when you search for it, you're getting a whole list of files.

21 THE COURT: Well, you are getting a list of files to
22 investigate further, is what you're getting, isn't it?

23 THE WITNESS: Correct.

24 THE COURT: So, but until you investigate them, you
25 don't know whether, in fact, they are adult or children?

1 THE WITNESS: Correct.

2 THE COURT: So the only certainty is, is that you've
3 gotten something to pursue further?

4 THE WITNESS: To look at; correct.

5 THE COURT: To look at, as opposed to saying that that
6 is, in fact, child pornography?

7 THE WITNESS: Correct.

8 THEH COURT: Now, on these file names that you
9 identified as child pornography files, does the same explanation
10 apply to those as well? That this is a file that you can search
11 for child pornography, but it remains to be investigated
12 whether, in fact, it is child pornography?

13 THE WITNESS: Correct.

14 THE COURT: So that really is your testimony as to the
15 earlier files and search terms that you described?

16 THE WITNESS: Correct.

17 THE COURT: Anything further?

18 MS. DAUGHTREY: I do have one question.

19 FURTHER EXAMINATION

20 BY MS. DAUGHTREY:))

21 Q. The hash values -- those are also used by the
22 peer-to-peer?

23 A. Software; yes, ma'am.

24 Q. And in your forensic software?

25 A. Correct.

1 Q. So this is something that's common that's done
2 with these -- ?

3 A. Yes, ma'am. Hash values are common throughout
4 all computer stuff.

5 MS. DAUGHTREY: All right.

6 MS. THOMPSON: And I have one more question after that.

7 FURTHER EXAMINATION

8 BY MS. THOMPSON:))

9 Q. But the hash values are based on different
10 number bases. Gnutella may use base 16. Somebody else uses
11 base 32 or 64. So you can't necessarily compare one hash value
12 to a whole another program that's in hash values?

13 A. That is correct in some respect. Like the
14 Limewire Gnutella network will use one standard of hashing,
15 where like in my computer forensics, I use a different standard
16 of hashing. They are both hash values. They are just different
17 algorithms.

18 THE COURT: Anything further of this witness?

19 MS. DAUGHTREY: Not from the government, Your Honor.

20 THE COURT: You may step down, sir.

21 THE COURT: Any further argument, either side?

22 MS. DAUGHTREY: Your Honor, I think it's clear yet
23 again that this detective has specialized knowledge in
24 peer-to-peer investigations from his testimony about his
25 training. He didn't testify -- if you look at the transcript,

1 and we were looking at it earlier, he didn't testify that those
2 search terms in Exhibit 9 were automatically going to mean that
3 this defendant possessed or received child pornography.

4 THE COURT: That was the distinct impression that his
5 testimony left. That the file names and the search terms would
6 yield child pornography. And that's something I think that --
7 that is my distinct recollection of the whole focus of that
8 testimony. Investigating child pornography is what he has just
9 said, not that they are known producers of child pornography.

10 And since the Supreme Court's decision in Ashcroft v.
11 Free Speech Coalition, 535 U.S. 234 (2002), the court held
12 unconstitutional subparagraph (b) of 2286(8) that deemed to be
13 contraband an image appears to be of a minor engaging in
14 sexually explicit conduct as unconstitutional.

15 So it seems to me that the reliability factor has to --
16 has to increase. And what was presented earlier as expertise is
17 now striking the Court as really just investigative techniques.
18 Here's how you go about identifying leads to determine whether
19 something is, in fact, child pornography.

20 MS. DAUGHTREY: Well, but he's not being charged with
21 violation of the law for having those search terms. What he's
22 charged with is violation of the law for having child
23 pornography.

24 THE COURT: Yes, but the testimony of this witness --
25 my distinct recollection of it was to show that if these search

1 terms are found on your computer, then there is possession of
2 child pornography, you are in possession of child pornography.
3 Whereas what he really is saying is that this will lead me
4 further to examine whether there is child pornography. And to
5 me, that is a quantitative difference.

6 Anything further?

7 MS. DAUGHTREY: Your Honor, I would submit that, you
8 know, the government has to prove intent. And one of the things
9 in his experience of doing this is that he uses these terms to
10 find child pornography. And I think that that's an important --

11 THE COURT: I don't think there is any problem with
12 that. There is no problem with that. I mean, that's legitimate
13 technique. But it was posed to the witness that, by virtue of
14 him finding these terms, that there is child pornography on the
15 defendant's computers. That's how it was cast to the jury.

16 MS. DAUGHTREY: Well, the point that the government --
17 the reason that the government brought that in was to show that
18 he did have an intent to do that, Your Honor. I'm not sure that
19 the testimony --

20 THE COURT: If you say he has the intent by virtue of
21 the existence of the search terms or the names, then you really
22 don't know that until you first determine whether what's there
23 is actually child pornography or not. If it's not child
24 pornography, then those terms are meaningless.

25 MS. DAUGHTREY: Well, but the other government's other

1 proof shows that there was child pornography on it. We're not
2 completely done with our proof at this point.

3 THE COURT: I don't know what the other proof is. The
4 question I have before me is the reliability of the opinion
5 testimony that this witness gave on direct examination that
6 these search terms and these file names reflect that he had
7 child pornography on his computer.

8 MS. DAUGHTREY: Your Honor, I don't think that's what
9 he testified to. And I would like to be able to look at the
10 transcript to verify that. I think what he testified to was
11 these are known child pornography search terms.

12 THE COURT: That was the whole point that you were
13 saying. These terms are shown to show his intent. So that had
14 to be the purpose of the witness's testimony, was to say that he
15 intended to possess these because these file names and these
16 search terms were on his computer. I mean, that's what you just
17 said. You had to prove intent. And these search terms are to
18 show intent. So that had to be the purpose of his testimony,
19 was to establish that the existence of these search terms and
20 the existence of these file names means he intended to have
21 child pornography.

22 MS. DAUGHTREY: And I think the government is entitled
23 to show the jury what file names were there and what search
24 terms he used.

25 THE COURT: Well, that's showing the factual

1 background. But that's not how you posed this witness. You
2 posed this witness as an expert on child pornography.

3 MS. DAUGHTREY: I think he was posed as an expert in
4 peer-to-peer investigations, is what we came down to in the end.

5 THE COURT: Well, peer-to-peer investigations is how
6 computers operate to share information.

7 MS. DAUGHTREY: Right.

8 THE COURT: But you were asking his opinions on, does
9 that show -- what does that site reveal? That site reveals
10 child pornography. And it may on some occasions, and it may not
11 on others.

12 MS. DAUGHTREY: Your Honor, we didn't talk about any
13 sites or any -- I would like to go back and look at the
14 transcript, if possible, because I don't think he testified that
15 it meant that he had child pornography on his computer. I don't
16 think that -- the testimony was that he was intending to look
17 for child pornography. But that's different than saying that he
18 is guilty of it. I think it's just one part of the proof, that
19 those search terms -- and I think that's what he testified.
20 Those search terms are known terms for child pornography.

21 THE COURT: Anything else?

22 MS. DAUGHTREY: No, Your Honor.

23 THE COURT: For the defense? Anything else?

24 MS. THOMPSON: No, Your Honor.

25 THE COURT: We're in recess.

1 (Recess.)

2 THE COURT: I think the best approach to this is to get
3 a record of the actual testimony. I'm advised by the court
4 reporter that this will be a rough draft. If there are any
5 particular areas of contention, she can get a certified portion
6 of that. I do think that it would be helpful to the Court to
7 reexamine the testimony before taking any other matters or
8 acting on the defendant's motion.

9 Any other matters? I understand that the court
10 reporter can provide a complete rough draft within about 15
11 minutes.

12 (Conclusion of proceedings of 2/25/15.)

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REPORTER'S CERTIFICATE

I, Peggy G. Turner, Official Court Reporter for
the United States District Court for the Middle
District of Tennessee, with offices at Nashville, do
hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on February 25, 2015, in the matter of USA v. JEREMY SETH TUMMINS, Case No. 3:10-00009; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript, Pages 1 through 85, is a true and accurate record of said proceedings.

This the 9th day of April, 2015.

Peggy G. Turner
S/Peggy G. Turner, RPR
Official Court Reporter